No. 49859-6-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RONLEY SANTER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

The trial court erred and relieved the State of its burden of proving each element of the offense when it refused to instruct the jury on the lawful use of force.[1]

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Decisions from the Washington Supreme Court and the United States Supreme Court have long held that the Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. In addition, the Due Process Clause requires that where a fact negates an essential component of an offense, the State must disprove that fact beyond a reasonable doubt. Where the lawful use of force negates a fact necessary for conviction and there is some evidence supporting the lawful use of force, the trial court must instruct the jury on the use of force and the State's burden to disprove it. Did the trial err when it refused to instruct the jury on the lawful use of force?

[1] Because the defense proposed instruction is not numbered, Mr. Santer cannot comply with the requirement of RAP 10.3(g). The proposed instruction is in the Clerk's Papers. CP 7.

C. STATEMENT OF THE CASE

Colin Shanklin spent a summer evening in his trailer in Vancouver drinking beer, smoking marijuana and playing video games. RP 136-38. When he ran out of beer, he rode his bike to a nearby convenience store to purchase more. RP 138. He recalled making several trips to the store that evening purchasing beer, cigarettes and perhaps some food. RP 138-39. On each trip, Mr. Shanklin rode along the perimeter of Evergreen Park. RP 140.

Ronley Santer and a group of friends were gathered in the park that evening. RP 312. When Mr. Santer first arrived at the park he encountered a former co-worker, whose name he could not recall. RP 309-10. The two joined a larger group of people who Mr. Santer knew and who, like him, lived close by. RP 310

As they socialized in the park, Mr. Shanklin, riding a bicycle, approached Mr. Santer and his former co-worker. RP 316. Mr. Shanklin asked if the two had "anything" to sell, perhaps a request to buy drugs. RP 317. Mr. Santer responded they did not and began walking back to the group. RP 317-18.

As he walked back to the group, Mr. Santer heard a punch and turned to see his friend and Mr. Shanklin fighting on the ground. RP

318. Mr. Santer did not know who threw the first punch, but saw Mr. Shanklin on top of his friend. RP 319. Mr. Santer went to his friend's assistance and began hitting Mr. Shanklin. RP 320-21. In the course of the struggle, Mr. Shanklin stabbed Mr. Santer in the calf with a pocketknife. Mr. Shanklin than ran from the park. RP 322. After Mr. Shanklin left the park, Mr. Santer noticed his former co-worker had left as well. *Id.*

Mr. Shanklin claimed he was riding home when several men, including Mr. Santer, waived him over. RP 142. According to Mr. Shanklin, the men asked him for a cigarette. *Id.* As they talked, one of the men, not Mr. Santer, commented that he liked Mr. Shanklin's bike and grabbed it. RP 146. Mr. Shanklin testified that when he resisted, Mr. Santer punched him in the side of his head. RP 146-47. Mr. Shanklin claimed he fell to the ground and the men hit him until he stabbed one of the men in the leg. RP 147-48. Mr. Shanklin left on foot and called police. RP 151.

The State charged Mr. Santer with first degree robbery. CP 3.

At trial, the court refused to instruct the jury that the use of force is lawful when used in defense of another and that Mr. Santer was

entitled act in defense of another based upon the circumstances as they reasonably appeared to him even if mistaken. CP 7; RP 386.

The jury convicted Mr. Santer. CP 46.

D. ARGUMENT

By refusing to instruct the jury on Mr. Santer's lawful use of force the trial court relieved the State of its burden of proving each of the necessary elements of the offense.

1. The State must prove beyond a reasonable doubt each fact necessary for conviction, including those that negate an ingredient of the offense.

> Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of trial and applies to every element necessary to constitute the crime.

Davis v. United States, 160 U.S. 469, 487, 16 S. Ct. 353, 40 L. Ed. 499 (1895). The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

> *Mullaney* [*v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)] held that a State must prove every ingredient of an offense beyond a reasonable doubt, and

> that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

Patterson v. New York, 432 U.S. 197, 215, 97 S. Ct. 2319, 52 L. Ed. 2d 281 (1977).

> The State is foreclosed from shifting the burden of proof to the defendant . . . when an affirmative defense *does* negate an element of the crime.

Smith v. United States, __ U.S. __, 133 S. Ct. 714, 719, 184 L. Ed. 2d (2013) (internal citations omitted); *see also State v. Deer*, 175 Wn.2d 725, 734, 287 P.3d 539 (2012), *cert. denied*, 133 S. Ct. 991 (2013).

Thus, in addition to the statutory elements of an offense, the State must disprove a defense where (1) the statute indicates the Legislature's intent to treat the absence of a defense as "one of the elements included in the definition of the offense of which the defendant is charged;" or (2) the defense negates an essential ingredient of the crime. *State v. McCullum*, 98 Wn.2d 484, 491-93, 656 P.2d 1064 (1983); *see also Deer*, 175 Wn.2d at 734 ("when a defense 'negates' an element of the charged offense . . . due process requires the State to bear the burden of disproving the defense").

Applying this framework to the issue of the defense of others in a second degree robbery prosecution as an accomplice, it is clear the State must bear the burden of proving the use of force was unlawful.

2. *Because it negates an ingredient of first degree robbery the State must disprove the lawful use of force.*

RCW 9A.16.020(3) provides the use of force is lawful when:

> . . . used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person . . .

Under RCW 9A.08.020(3)

> . . . for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged.

State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (Emphasis in original). RCW 9A.08.010 provides:

> (b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:
> (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense . . . .

Proof of "knowledge" required the State prove Mr. Santer "actually knew" he was assisting in the commission of the robbery. *State v.*

Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015) (citing RCW 9A.08.020(3) (accomplice must have actual knowledge that principal was engaging in the crime eventually charged); *State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980). To convict a person of first degree robbery as an accomplice the State must prove the person was knowingly aiding in the commission of robbery including the use or threatened use of force to obtain property. *State v. Farnsworth*, 185 W.2d 768, 780, 374 P.3d 1152 (2016).

By definition, where the use of force is lawful, it negates the unlawfulness of any act. *McCullum*, 98 Wn.2d at 495. For example, after examining the definition of criminal negligence in RCW 9A.08.010, this Court in *State v. Dyson*, 90 Wn. App. 433, 952 P.2d 1097 (1997), held that self-defense must be available in a third degree assault because it negated proof that the act was unlawful. Specifically, a person acting in self-defense was not "fail[ing] to be aware of a substantial risk that a wrongful act may occur." *See* RCW 9A.08.010(1)(d). That is, the lawful use of force negates the person's awareness that a wrongful act may occur. *Dyson*, 90 Wn. App. at 438. The same is true where the State must prove a person acted with knowledge. In *State v. Acosta*, the Court held that when force is

lawfully used it negates the State's proof that he person was aware of facts or circumstances "described by a statute defining an offense;" the definition of knowledge in RCW 9A.08.010. 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

The lawful use of force similarly negates an accomplice's actual knowledge that he is assisting in an act that is a crime. The key to whether a defense negates a component of the offense "is whether the completed crime and the defense can coexist." *State v. W.R., Jr.*, 181 Wn.2d 757, 765, 336 P.3d 1134 (2014). Similar to *Acosta*, it is impossible for one to have actual knowledge that they are assisting in a crime if they are employing lawful force.

The State was required to prove Mr. Santer actually knew he was assisting in the commission of a crime; that he was aware his friend was taking Mr. Shanklin's bike by force. *Farnsworth*, 185 W.2d at 780. Defense of another specifically negates the actual knowledge required, as a person employing lawful force cannot actually be aware of facts "described by a statute defining an offense." The lawful use of force and accomplice liability cannot coexist. A person cannot be criminally liable as an accomplice if his use of force was lawful. The defense negates an accomplice's actual knowledge that he is assisting

in the commission of the crime charged. The State must disprove the defense beyond reasonable doubt. *Smith*, 133 S. Ct. at 719; *Deer*, 175 Wn.2d at 734.

3. The trial court erred in concluding the defense of lawful use of force could not apply.

Mr. Santer requested the court instruct the jury on the lawful use of force as a defense and the State's burden to disprove it beyond a reasonable doubt. CP 7; RP 263, 268. Mr. Santer argued that the defense negated the knowledge necessary to be an accomplice. RP 368.

The trial court refused to provide the instruction to the jury. RP 386. In doing so, the trial court relied on *State v. Lewis*, 156 Wn. App. 230, 233 P.3d 891 (2010), in which this Court affirmed the trial court's refusal to instruct on self-defense in a prosecution for first degree robbery. RP 385-87. *Lewis* concerned a claim of self-defense by a person alleged to have been the sole participant in a robbery who was found in possession of the victim's money upon arrest. 156 Wn. App. at 234. *Lewis* did not address the availability of a lawful use of force defense where a person is charged as an accomplice to the offense. As discussed below, that distinction matters.

Lewis reasoned that because the first degree robbery statute does not included an element of intent, self-defense could not negate this

missing intent element. 156 Wn. App. at 238-39. But *Lewis* examined only the language of the first degree robbery statute to conclude there was no intent to negate. *Lewis* failed to examine the crime of robbery generally, which does require the person use force coupled with intent to steal.

> Although our robbery statute, RCW 9A.56.190, does *not* include an intent element, our settled case law is clear that "intent to steal" *is* an essential element of the crime of robbery.

State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) (footnotes omitted). Thus, there is an element of intent in every robbery.

In any event, the lawful use of force is not limited to crimes which include an element of intent. *McCullum* did say the State bore the burden of disproving the lawful use of force because it negated intent, but that was not because there is something special about "intent." Rather, the Court reasoned the lawful use of force negates the "unlawfulness" included in the definition of intent. 98 Wn.2d at 495. That same analysis applies to every *mens rea*. *Acosta*, 101 Wn.2d at 616 (because it is impossible for one who uses lawful force to be aware of facts or circumstances "described by a statute defining an offense" lawful use of force negates knowledge); *State v. Hanton*, 94 Wn.2d 129, 133, 614 P.2d 1280 (1980) (lawful use of force negates

recklessness because "self-defense is not wrongful, it cannot be 'a gross deviation from conduct that a reasonable man would exercise in the same situation.'") (citing RCW 9A.08.010(1)(c)); *Dyson*, 90 Wn. App. at 438 (lawful use of force negates the "unlawfulness" element in the definition of negligence). Thus, whether RCW 9A.56.200 contains an element of intent is immaterial.

More importantly, *Lewis* did not examine the components of the charge of robbery where a person is charged as an accomplice. In such circumstances the State is unquestionably required to prove the person acted with actual knowledge that they were assisting in the commission of a crime. *Farnsworth*, 185 Wn.2d at 780; *Allen*, 182 Wn.2d at 374. The lawful use of force in such a case negates the mental state that the person acted with knowledge that they were assisting in the taking of property by force. The trial court nonetheless concluded the fact that Mr. Santer was charged as an accomplice did not alter *Lewis's* analysis. RP 385-86. In fact, *Lewis* never engaged in that analysis at all. The trial court in this case wrongly extended *Lewis* beyond its holding and beyond what the law permits.

Finally, the trial court's reading of *Lewis* as categorically barring any claim of the lawful use of force in all robbery prosecutions,

even when a person is charged only as an accomplice is contrary to the long recognized view that a person may act on appearances in assisting another who they believe to be the victim of a crime rather than the perpetrator.

The defense of another expressly permits the defendant to act on appearances. Washington requires the jury to inquire whether "under the circumstances *as the actor believes them to be*, the person whom he seeks to protect would be justified in using such protective force." *State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977) (Emphasis added) (citing American Law Institute's *Model Penal Code* § 3.05(1) (Adopted 1962)). In *Penn*, the court drew from an earlier case in which it noted:

> "Actual or positive danger is not indispensable to justify self-defense. Men when threatened with danger are obliged to judge from appearances and to determine therefrom in the light of all the circumstances the actual state of the surroundings, and in such cases if they act upon reasonable and honest convictions, induced by reasonable evidence under all the circumstances, they will not be held responsible criminally for a mistake as to the extent of the actual danger."

State v. Tribett, 74 Wash. 125, 130, 132 P. 875 (1913) (quoting *State v. Claire*, 41 La. Ann. 191, 6 South. 129).

In adopting that view *Penn* struck a balance.

> We are aware this approach may cause an innocent person who is striking in self-defense, to be harmed with impunity merely because appearances were against him. However, we consider this to be a lesser evil than allowing an innocent defender who is acting under a mistake of fact to be convicted of a serious crime

Penn, 89 Wn.2d at 67. Even if he was mistaken, Mr. Santer was entitled to use force to aid a friend who he believed to be the victim of an assault rather than the perpetrator of a robbery. The categorical denial of the defense of another for one charged as an accomplice is directly contrary to the Supreme Court's policy decision.

4. Mr. Santer was entitled to an instruction on the lawful use of force.

"A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction." *State v. Werner*, 170 Wn.2d 333, 336, 241 P.3d 410 (2010). The quantum of evidence necessary is simply *any* evidence. *State v. Hendrickson*, 81 Wn. App. 397, 401, 914 P.2d 1194 (1996). In assessing whether the evidence warrants an instruction, a court must view the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456-57, 6 P.3d 1150 (2000). The defendant need not show sufficient evidence was presented to create a reasonable doubt regarding the defense. *State v. Adams*, 31 Wn. App.

393, 395, 641 P.2d 1207 (1982). Once any evidence supporting the defense is produced, "the defendant has a due process right to have his theory of the case presented under proper instructions even if the judge might deem the evidence inadequate to support such a view of the case were he [or she] the trier of fact …." *Id.* (internal quotation omitted).

Once some evidence is presented that the force used was lawful the defendant is entitled to have the jury instructed on the State's burden to prove beyond a reasonable doubt that the force used was not justifiable. *McCullum*, 98 Wn.2d at 499-500. Where the refusal to instruct on the lawful use of force is based on a legal ruling rather than on a finding that no supporting evidence was presented, this Court reviews the propriety of the refusal *de novo. State v. George*, 161 Wn. App. 86, 94-95, 249 P.3d 202 (2011).

Mr. Santer testified he was in the park with a large group of friends when Mr. Shanklin approached him and one his friends inquiring whether they had drugs to sell. RP 317. Mr. Santer replied they did not and turned to return to the larger group of people gathered. RP 317-18. As he walked away, he heard what sounded like a punch and turned to see Mr. Shanklin on top of his friend and the two appeared to be fighting. RP 318-19. Mr. Santer rushed to his friend's

aid and hit Mr. Shanklin. RP 320-21. Mr. Santer disclaimed any knowledge that his friend was attempting to take Mr. Shanklin's bike. RP 324. Instead, Mr. Santer believed his friend was the victim of an assault and went to his aid. In either event, Mr. Santer was entitled to act on the facts as they appeared to him even if he was mistaken. *Penn*, 89 Wn.2d at 66. Plainly, there was some evidence to support the instruction. The court erred and relieved the State of its burden of proof in refusing to instruct the jury on lawful force.

5. The trial court's error requires reversal of Mr. Santer's conviction.

Where a constitutional error occurs a conviction must be reversed unless the State can prove beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Where the outcome of a case turns on which version of events a jury believes, the failure to give a lawful force instruction is prejudicial. *Werner,* 170 Wn.2d at 338.

Here, the case turned on whether the jury believed Mr. Santer or Mr. Shanklin. The jury could well have believed Mr. Santer but without his requested instruction could nonetheless convict him. The error requires reversal. *Werner*, 170 Wn.2d at 338.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Santer's conviction.

Respectfully submitted this 20th day of July, 2017.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 49859-6-II
v.	)	
	)	
RONLEY SANTER,	)	
	)	
Appellant.	)	

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